

***N v UK*: No duty to rescue the nearby needy?**

Virginia Mantouvalou*

What duties do we owe a fellow citizen who faces severe suffering and death due to a life-threatening illness? Do we have any similar obligation towards a foreigner living in a remote country who suffers from such a condition? And would the answer to this latter question differ if the distant needy happened to be within our borders? This complex moral question was explored in a judgment of the Grand Chamber of the European Court of Human Rights (ECtHR), namely in *N v UK*,¹ which involved the issue of whether the removal from the United Kingdom (UK) of a Ugandan HIV-positive² asylum seeker would violate the European Convention on Human Rights (ECHR or *Convention*). The case split the 17-judge Grand Chamber, with the majority rejecting the applicant's claim to stay in the UK, with dissenting Judges Bonello, Spielmann and Tulkens arguing that her deportation would breach the ECHR.

The present article presents the judgment and identifies its key principles. It scrutinises the reasoning of the majority of the ECtHR, which held that returning the seriously ill applicant to her home country – which would have put her at a high risk of severe suffering and death – would not constitute inhuman and degrading treatment. The Court put emphasis, first, on the fact that Ms N's plight would stem from natural causes and not from human action, and second, on the idea that the Convention was not primarily concerned with wrongs resulting from socio-economic deprivation. This article suggests that both statements are misleading, for in exploring whether the applicant's situation was so extreme as to warrant her protection under the ECHR, the court misplaced its focus. I then propose an alternative principle that was at issue here – the duty to rescue the nearby needy – and set out the criteria grounding State responsibility under the ECHR. What emerges, in my view and in the opinion of the dissenting judges, is that the real reason that led the majority to conclude that there was no violation of the ECHR was based on consequentialist considerations, usually labelled as a 'floodgates argument', which I explore. Yet this argument was neither explicitly articulated,

* University of Leicester, School of Law. Thanks are due to Leto Cariolou, Hugh Collins, George Letsas, Achilles Skordas and Robin White for comments on a draft of this paper. A revised version of this article was published in the *Modern Law Review*, 2009(71):815.

¹ *N v UK*, App. No. 26565/05, Grand Chamber judgment of 27 May 2008, hereinafter cited as *N*.

² Human immunodeficiency virus.

nor closely scrutinised in the reasoning. The final part of the article discusses the implications of the judgment in *N v UK* for medical asylum applications.

Background

Ms N was a Ugandan national born in 1974. She arrived in the UK in 1998, and was diagnosed as HIV-positive upon arrival. She submitted an application for asylum, alleging that, should she be returned to her home country, the National Resistance Movement would imperil her life and bodily integrity. She also argued that returning her to Uganda would breach Article 3 of the Convention, because the country did not have the necessary infrastructure for her disease to be treated. Article 3 provides as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

While her asylum application was pending, she developed further HIV-related illnesses, but her condition was stabilised with medical treatment. A physician prepared a report on her medical condition in 2001, stating that –³

... without continuing regular antiretroviral treatment to improve and maintain her CD4 count, and monitoring to ensure that the correct combination of drugs was used, the applicant's life expectancy would be less than one year, due to the disseminated Kaposi's sarcoma and the risk of infections.

As regards the question of whether the treatment would be available in Uganda, the report suggested that it existed, “but only at considerable expense, and in limited supply in the applicant's home town of Masaka”,⁴ and added that “there was no provision for publicly funded blood monitoring, basic nursing care, social security, food or housing”.⁵

The asylum claim failed in domestic proceedings. The Court of Appeal held by majority that Ms N would not face extreme circumstances violating the Convention if she were made to return to her home country, and the House of Lords unanimously rejected the complaint.⁶ This situation would only be covered by the ECHR if it satisfied the test of “exceptional

³ *N* at 12.

⁴ (*ibid.*).

⁵ (*ibid.*).

⁶ *N (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* (2005) UKHL 31, on appeal from (2003) EWCA, Civ. 1369, hereinafter cited as *N* (House of Lords).

circumstances” that the ECtHR had developed in relevant case law – a condition that was not met. No “compelling humanitarian grounds” were said to demand that she be allowed to stay in the UK – a condition that would only have been held to apply had her illness reached a terminal stage. Before the ECtHR, Ms N claimed that removing her from the UK to Uganda would lead to her intense suffering and early death, because of the lack of adequate medical treatment for her illness, which lack in turn was due to the socio-economic conditions prevailing in Uganda. She alleged that her situation would amount to inhuman and degrading treatment, in contravention of Article 3 of the ECHR. The majority of the ECtHR rejected her claim, ruling that returning her to Uganda would not violate the Convention. The court held that, although States had the right to control entry and removal of non-nationals, there might be certain limitations to this power if the applicant faced a high risk of being subjected to inhuman treatment by the authorities of the receiving State or non-State bodies while the receiving authorities were unable to act so as to protect her from these non-State bodies.

The court accepted that medical asylum applications could also, in principle, give rise to a breach of the Convention. However, the circumstances in such claims have to be exceptional for the ECHR to be violated. The principle that the conditions have to be extreme and that the applicant has to be close to death so as to enjoy the protection of the Convention was said to be supported by two considerations:

- In medical asylum cases, the applicant’s suffering in the receiving country would stem from a naturally occurring illness and not from human action, and
- The Convention was primarily adopted to safeguard civil and political rights, and does not impose a duty to alleviate poverty in developing countries.

In the present case, Ms N was not held to face circumstances that would violate Article 3. She was fit to travel; she might have access to medical treatment in Uganda – albeit at a considerable cost and not in her home town; and she had some family that could look after her while her suffering lasted. For these reasons, the majority concluded that her deportation would be compatible with the ECHR.

Human rights and immigration policy

Human rights scholars and activists received the N judgment with disappointment.⁷ Was this reaction justified or was the reasoning of the Court correct? That States have the power to control who enters their territory, that they can plan and implement their own immigration policy, is a principle generally accepted in international law, in academic literature⁸ and in the case law of the ECtHR.⁹ Yet human rights law has, over the years, set substantive limitations on this discretion, which are supplementary to the protection recognised by refugee law. Deportation, extradition or expulsion is contrary to State obligations under the Convention if the applicant faces a serious threat of ill-treatment upon return to his/her home country¹⁰ – a principle that was emphatically and unanimously reiterated by the Grand Chamber of the ECtHR in the important *Saadi v Italy*,¹¹ which involved the return of a Tunisian national to his home country, where he would be at risk of torture. The court stated that –¹²

... expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.

⁷ See, for instance, Julien-Laferriere, F. 2009. "L'eloignement des etrangers malades: Faut-il preferer les realités budgetaires aux preoccupations humanitaires?". *Revue Trimestrielle des Droits de l'Homme*, 77:261. For activists' reactions, see, for instance, "Deportation from UK of refused HIV-positive asylum seeker to Uganda does not breach human rights, European Court rules"; available at <http://www.aidsmap.com/en/news/F3531FE4-A8F1-401F-8299-B427A9D88DB2.asp>; last accessed 7 January 2010.

⁸ For an interesting collection of essays, see Schwartz, WF (Ed.). 1995. *Justice in immigration*. Cambridge: Cambridge University Press.

⁹ N at 30.

¹⁰ See *Soering v UK*, App. No. 14038/88, judgment of 7 July 1989 (hereafter referred to as *Soering*), and *Chahal v UK*, App. No. 22414/93, judgment of 15 November 1996. For an overview of the case law, see Blake, N. 2004. "Developments in the case law of the European Court of Human Rights". In Bogusz, B, R Cholewinski, A Cygan & E Szyszczak (Eds). *Irregular migration and human rights: Theoretical, European and international perspectives*. Leiden/Boston: Martinus Nijhoff, p 431.

¹¹ *Saadi v Italy*, App. No. 37201/06, judgment of 28 February 2008; referred to as *Saadi* later herein.

¹² (*ibid.*:125).

Generally, in Article 3 claims, in order to decide whether the alleged treatment violates the ECHR, the court considers the facts in order to establish if the suffering to which the individual has been or will be subjected reaches a certain threshold of ill-treatment, called a *minimum threshold of severity*.¹³ If this is not attained, the impugned act falls outside the scope of the provision. As Article 3 contains one of the most fundamental principles in human rights law – an absolute and non-derogable right – it allows no balancing test, unlike other Convention rights.¹⁴

Prior to *N*, the sole example of a medical asylum application where the court found that the threshold of severity was attained was *D v UK*,¹⁵ a decision extensively discussed in *N*.¹⁶ The applicant there was a national of St Kitts, who had served a prison sentence for a drug-related offence in the UK. While in prison, he contracted HIV, which at the time that he completed his sentence and was due to be deported, was at a very advanced stage. Before the ECtHR he claimed that deportation to his home country would constitute inhuman and degrading treatment. The court stated that, when an individual claimed asylum for medical reasons, there was scope for Article 3 protection, but that in such a case “the Court must subject all circumstances surrounding the case to a rigorous scrutiny”.¹⁷ In *D*, the court was convinced that the conditions were “very exceptional”.¹⁸ The applicant’s immune system was irreparably damaged and his life was drawing to a close; in St Kitts he had no family to look after him or any other moral or social support; and the medical treatment was inadequate. The minimum level of severity in these extreme circumstances had, therefore, been reached.

The claim in *N* was approached by the ECtHR in a manner similar to *D*, implying that both cases involved the same principles, but that perhaps a line could be drawn to separate them based on the level of the applicants’ misfortune. The court suggested that, unlike Mr D, Ms N did not face an extreme degree of suffering at the time that her case was being heard: she was not close to death; she was fit and able to travel, thanks to the medical treatment that she had received; notwithstanding that it was not clear whether she would have access to

¹³ See *Ireland v UK*, App. No. 5310/71, judgment of 18 January 1978 at 162.

¹⁴ On this see, in particular, (*ibid.*:130ff), cited also in the dissenting opinion at (*ibid.*:7).

¹⁵ *D v UK*, App. No. 30240/96, judgment of 2 May 1997, hereinafter cited as *D*. See also *BB v France*, App. No. 30930/96, judgment of 7 September 1998, where the European Commission of Human Rights found a breach of the ECHR, but a friendly settlement was subsequently reached.

¹⁶ *D* at 32–34.

¹⁷ (*ibid.*:49).

¹⁸ (*ibid.*:54).

the drugs that she needed in Uganda, she would at least have some family by her side during the time that she would be dealing with the devastating consequences of her condition. For these reasons, her plight was not very exceptional and did not reach the threshold of severity required to trigger the protection of Article 3.

While the cases *N* and *D* bear similarities, I suggest that the difference of degree in the applicants' condition leads to qualitatively distinct duties under the Convention. In *D*, the question was whether Article 3 imposed a humanitarian obligation to let someone stay in a country where the conditions might be less distressing, as the applicant's life was drawing to a close and the circumstances back home were extremely poor. Indeed, in this extreme situation, to let Mr D stay in the UK was found to be a duty imposed by the ECHR. In *N*, on the other hand, the real issue was whether the applicant's removal from the country – and the resulting high likelihood of a dramatic change from living a decent life for years to come, to a high risk of severe suffering and a much earlier death in Uganda – would constitute extremely harsh treatment, and so reach the minimum threshold of severity violating Article 3. The question, to use the words of Lord Nicholls, was whether returning Ms N to her country, which would probably have dramatic consequences equivalent “to having a life-support machine turned off”,¹⁹ would breach the Convention. The *N* case, then, did not concern the question of whether the UK had a duty to let the applicant stay to die, like in *D*, but whether it had a duty to let her stay and live a decent life. For this reason, the two cases might be distinguished and regarded as triggering different obligations – a point that will be further explored later on.

The crucial act

Before analysing further State duties under the ECHR in medical asylum cases such as *N*, we need to observe more closely the key considerations that the majority used to support their ruling. In articulating the main principles that were decisive in the judgment, emphasis was placed on a certain line that is to be drawn between medical asylum cases, such as *N* and *D*, and other extradition or expulsion cases, such as *Saadi*. The difference between the two lines of cases, in terms of this view, rests on the fact that, in the former, –²⁰

¹⁹ Lord Nicholls, *N* (House of Lords) at 4.

²⁰ *N* at 43.

... the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

Is it correct to place our attention on the source of suffering following the return of the applicant to her home country? Is this the crucial situation that gives rise to a breach of Article 3? This might be pertinent if we were looking at States' obligations towards the distant needy.²¹ However, if we are looking at the obligations of the authorities that seek to return an individual who is already within their borders, the crucial act does not concern the source of the suffering after that individual's return, namely some State action or omission, or some other disaster in a foreign country: the alleged violation of the Convention does not occur extraterritorially. The crucial act is that of the extradition, deportation or expulsion that has certain particular consequences – a point that was emphasised in *Saadi*.²²

In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment.

In *Soering*, to use another example, it was not the death row phenomenon that violated the Convention on the part of the UK – a situation in which the UK authorities were, in any case, not involved – but the decision to extradite the applicant to a country where he was at risk of facing that penalty. The active and intentional nature of the decision – and action upon that decision – to deport, extradite or expel, which has a high likelihood of severe suffering and death of the applicant as its foreseeable effect, engages State responsibility under the Convention. And it is precisely that act that should have been scrutinised in the *N* judgment.

The ECHR and socio-economic conditions: An 'integrated approach' to interpretation

In presenting the second principle deriving from past case law, the court stated that –²³

²¹ For a discussion of the matter, see Pogge, T. 2007. "Severe poverty as a human rights violation". In Pogge, T (Ed.). *Freedom from poverty as a human right*. Oxford: Oxford University Press, pp 11, 16.

²² *Saadi* at 126. For further support from the case law, see the dissenting opinion in *N* at 5.

²³ *N* at 44.

[a]lthough many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.

This statement marks a retrograde step in the protection of socio-economic aspects of the rights protected under the ECHR, a point that was emphasised in the dissenting opinion of Judges Bonello, Spielmann and Tulkens.²⁴

The artificial dichotomy created between civil and political rights, on the one hand, and socio-economic rights, on the other, has been challenged over the last few years in academic literature and in law in several jurisdictions. Most importantly for the present purposes, the ECtHR itself has questioned this separation. From as early as 1979 and the landmark *Airey* judgment,²⁵ which involved the right to be granted legal aid for the purposes of judicial separation from the applicant's husband, to decisions such as *Sidabras & Dziautas*,²⁶ which examined the applicants' dismissal and ban from access to public and private sector employment because of their former KGB²⁷ membership, the court adopted a stance that was described in the literature as an "integrated approach" to interpretation.²⁸ Following this interpretive method, the court argued that "there is no water-tight division"²⁹ separating socio-economic rights from the entitlements covered in the Convention. Civil and political rights cannot be made effective unless their socio-economic aspects are also guaranteed, while the breach of a right that would have traditionally been classified as *social* may, in certain circumstances, give rise to State responsibility under the ECHR. Adopting this interpretive method, the court has endorsed the view that civil and social rights are two sides of the same coin: social rights have moral weight similar to that of civil and political

²⁴ *N*, dissenting opinion at 6.

²⁵ *Airey v Ireland*, App. No. 6289/73, judgment of 9 October 1979; hereafter referred to as *Airey*.

²⁶ *Sidabras & Dziautas v Lithuania*, App. No.'s 55480/00, 59330/00; judgment of 27 July 2004.

²⁷ Abbreviation of the Russian title of the Committee for State Security, the national security agency of the former Soviet Union.

²⁸ See Mantouvalou, V. 2005. "Work and private life: *Sidabras and Dziautas v Lithuania*". *European Law Review*, 30:573, cited in *N* by dissenting Judges Bonello, Spielmann and Tulkens at 6. For a discussion of this interpretive method in workplace rights under the Human Rights Act, 1998, see Collins, H. 2006. "The protection of civil liberties in the workplace". *Modern Law Review*, 69:619. For an overview of Strasbourg case law, see Brems, E. 2007. "Indirect protection of social rights by the European Court of Human Rights". In Barak-Erez, D & E Gross (Eds). *Exploring social rights*. Oxford: Hart, p 135.

²⁹ *Airey* at 26.

rights, and they may sometimes be essential conditions for the realisation of the material scope of the Convention.

Article 3 constitutes a provision that has given rise to socio-economic claims both before Strasbourg decision-making bodies and in the UK. An early example to illustrate this is *Francine van Volsem v Belgium*³⁰ which involved whether cutting off or the threat of cutting off the electricity from the applicant's council flat while she was a depressive, suffering from chronic respiratory problems that made it difficult for her to find a job, and was caring for her ill grandchild constituted degrading and humiliating treatment. The Committee examining the admissibility of the case suggested that, although in principle facts such as these might have given rise to a breach of Article 3, the minimum level of severity had not been attained. The complaint was, therefore, declared inadmissible in a decision that was criticised by Antonio Cassese for not providing a sufficiently rigorous analysis to enlighten us on the exact standard of socio-economic deprivation required for Article 3 to apply.³¹ In *Moldovan v Romania*³² the applicants' appalling living conditions, which were due to the destruction of their houses by individuals incited by the police, coupled with the authorities' racist behaviour towards them, were held to breach Article 3.

Socio-economic conditions have also given rise to complaints under the Human Rights Act, 1998, at a domestic level in the UK.³³ An interesting illustration is to be found in the *Limbuella, Tesema & Adam* judgment of the House of Lords.³⁴ They ruled that the decision of the Secretary of State to withdraw social support from asylum seekers – at a time when they were banned from employment and while their application for asylum was pending, for the reason that they did not apply for asylum as soon as reasonably practicable after their arrival

³⁰ *Francine van Volsem v Belgium*, App. No. 14641/89, Admissibility Decision of 9 May 1990. *Droit Social*, 1999(1):88. Discussed by Pettiti, L. 1999. "Pauvreté et Convention Européenne des Droits de l'Homme". *Droit Social*, 1999(1):84.

³¹ Cassese, A. 1991. "Can the notion of inhuman or degrading treatment be applied to socio-economic conditions?". *European Journal of International Law*, 2:141.

³² *Moldovan & Others v Romania* (No. 2), App. No.'s. 41138/98, 64320/01; judgment of 12 July 2005.

³³ For a thorough analysis of the matter, see O'Connell, C. 2008. "A modest proposal: Destitution, State responsibility and the European Convention on Human Rights". *European Human Rights Law Review*, 583. See also Palmer, E. 2007. *Judicial review, socio-economic rights and the Human Rights Act*. Oxford: Hart.

³⁴ *R (on the application of Limbuella, Tesema & Adam) v Secretary of State for the Home Department* (2005) UKHL at 66.

in the country, with the effect of letting the applicants live in destitution – amounted to a violation of Article 3.

The view that there is a dividing line that separates civil and political rights from socio-economic rights has been questioned in several cases. The two sets of entitlements have been presented in jurisprudence as not only essential for individual well-being, but also as necessary conditions for the protection of the rights incorporated in the ECHR itself. Why, then, did the majority of the ECtHR decide to put forward a statement that undermines the *Airey* principle?

A duty to rescue the nearby needy

I have this far argued that the court erroneously placed its attention on the cause of suffering following Ms N's return, and suggested that the crucial act on which it should have focused was the active and intentional decision of State authorities to deport her. I also claimed that there is no sharp line separating civil and political from socio-economic rights – a position that finds support even in several ECtHR cases. In addition, I suggested that the facts in *N* might be distinguished from *D*, because the latter raises the question of recognising a right to stay when a person's life is drawing to a close, while the former involves a choice between the possibility to live a decent life, on the one hand, and deportation that has as its effect a high probability of a dramatic deterioration of life quality and expectancy, on the other. What the section that follows suggests is that *N* concerned the question whether the Convention might in certain circumstances impose on Member States a duty to rescue the nearby needy. What is the content of this duty, and could it be seen as falling within the material scope of Article 3?

When *N* was being considered by the House of Lords, Lord Nicholls stated that –³⁵

... [i]t would be strange if the humane treatment of a would-be immigrant while his immigration application is being considered were to place him in a better position for the purposes of Article 3 than a person who never reached this country at all.

I suggest, contrary to this argument, that the distinction between the needy who are distant and those who are close by is morally justifiable and legally significant.

³⁵ Lord Nicholls, in *N* (House of Lords) at 17.

Regarding the moral justification of the difference of treatment, it can be argued fairly that we might owe different – stronger – obligations to those who are close by, those who are members of our community, irrespective of their nationality, than to the needy who are distant. In his paper entitled “Moral closeness and the world community”,³⁶ Richard Miller states that –³⁷

... [o]rdinary moral thinking about aid to needy strangers discriminates in favor of the political closeness of compatriots and the literal closeness of people in peril who are close at hand.

The idea of *closeness* is based on the fact that we have special relationships with several people, such as certain members of our family or friends, compatriots or others that belong to our community, which justify the intuition that we owe special duties to them. These special obligations make their partial treatment morally defensible: they explain the position that we have stronger duties to aid those who are close to us when they are in need – without foreclosing our duty to assist the distant needy too.³⁸ Miller described the moral principle of ‘nearby rescue’ as follows:³⁹

One has a duty to rescue someone encountered close by who is currently in danger of severe harm and whom one can help to rescue with means at hand, if the sacrifice of rescue does not itself involve a grave risk of harm of similar seriousness or of serious physical harm, and does not involve wrongdoing.

Although the force of the argument – that we have an obligation to save someone who is in peril and is found close to us when we can do so at minimal risk – seems compelling, it is not uncontroversial. This is because it raises issues surrounding the moral weight of the complex distinction between *action* and *omission*. To be sure, an analysis of this matter is beyond the scope of the present article, although it should be said that human rights law imposes on State authorities not only correlative duties to refrain from action, but also stringent duties to act.⁴⁰ In any case, this discussion would perhaps be pertinent if we had a different set of facts, e.g. if UK authorities witness a situation whereby a boat with illegal

³⁶ Miller, R. 2004. “Moral closeness and the world community”. In Chatterjee, DK (Ed.). *The ethics of assistance – Morality and the distant needy*. Cambridge: Cambridge University Press, p 101.

³⁷ (ibid.).

³⁸ On this debate, see (ibid.).

³⁹ (ibid.:115).

⁴⁰ See Fredman, S. 2008. *Human rights transformed – Positive rights and positive duties*. Oxford: Oxford University Press.

immigrants on board is caught in a storm and is in danger of sinking, and do not attempt to prevent the loss of human life. In cases such as *N*, though, the crucial act that raises issues under the Convention is that of deportation – positive State action, rather than inaction – so the distinction between *act* and *omission* is not pertinent.

While the duty to rescue the nearby needy appears to be a weighty moral consideration, its legal relevance might be questioned. In law, the duty to rescue perhaps first brings to mind questions regarding the commission of a crime by omission, a matter that common law and civil law countries approach differently. In continental Europe and Latin America, criminal codes or legislation frequently contain provisions dictating that one can be held liable for a crime committed by omission when one fails to rescue a person in danger, provided that assistance can be given without setting oneself or others in peril.⁴¹ However, criminalisation of omission is controversial, and rare in common law traditions.⁴²

In human rights law, the legal aspect of the duty to rescue begs two sets of observations. Firstly, the principle that there is a legal duty under the ECHR to protect life at risk from natural causes might be exemplified in cases such as *Budayeva v Russia*.⁴³ The ECtHR examined whether State authorities breached Article 2 (the right to life), among other provisions, by not taking the necessary steps to ensure the safety of the population from the danger of mudslides that devastated the area where they lived. The ECtHR ruled that Russia had violated the right to life. That there is a positive obligation to protect human life under the Convention in these circumstances is, therefore, not novel. It might of course be more readily accepted that not providing a foreign national with emergency medical treatment, if caught in an accident within our borders, would violate our duty to rescue the life of someone in peril. Yet – and this brings us to the second relevant consideration – the non-refoulement cases demonstrate that we may sometimes have a stringent duty to protect someone within our territory from a danger that might occur extraterritorially; this is not an obligation that we owe to remote foreigners subjected to similar suffering. The above observations suggest that the ECHR might be interpreted as incorporating a duty to rescue someone in the position of Ms N, and that different treatment of those close at hand and those that are in remote countries might be justified.

⁴¹ See, for instance, Article 223(2) of the French Criminal Code.

⁴² For an analysis, see Murphy, L. 2001. "Beneficence, law and liberty: The case of required rescue". *Georgetown Law Journal*, 89:605.

⁴³ *Budayeva & Others v Russia*, App. No.'s 15339/02, 211266/02, 11673/02, 15343/02; judgment of 20 March 2008. See also *Oneryildiz v Turkey*, App. No. 48939/99, judgment of 30 November 2004.

If it is accepted that medical asylum cases can, in principle, fall within the scope of the Convention, what criteria could be used to establish that a State is responsible under Article 3? Drawing to an extent on the considerations of the court in *D*,⁴⁴ I propose that the minimum level of severity is reached if the following conditions are met:

- An individual is physically present within the territory – and, therefore, within the jurisdiction for the purposes of Article 1 of the ECHR – of a Council of Europe Member State
- S/he is in the advanced stages of a terminal and incurable illness or other medical condition of similar gravity
- There is medical treatment and support available for her illness in the Member State of the Council of Europe that can guarantee a decent way of living, albeit for a relatively short period of time, and
- His/her removal and consequent withdrawal of treatment is likely to lead to a dramatic deterioration of the individual's circumstances (in terms of significantly increased suffering and bringing on a much earlier death), either because of a lack of medical treatment for the illness in the individual's country of origin, or because the applicant would most likely lack access to such treatment due to, for example, its unaffordable cost.

The examination of the conditions in the applicant's home country should be based on various sources,⁴⁵ i.e. materials of international organisations such as the World Health Organisation; specialist bodies such as the United Nations Committee of Economic, Social and Cultural Rights; or specialist non-governmental organisations (NGOs). These have to be closely examined so as to establish whether a minimum standard of decency prevails in the receiving State.

Additional weighty considerations in the overall assessment of the case might include the length of the applicant's stay in the country; whether the State has assumed responsibility for his/her treatment during this period;⁴⁶ and the relationships that s/he has formed in the meantime – a matter that could also raise issues under the right to a private life.⁴⁷ Looking

⁴⁴ See *D* at 48–52.

⁴⁵ See, for instance, *N* at 18–19.

⁴⁶ *D* at 53.

⁴⁷ Article 8 issues were raised but rejected without analysis in *N*, a point that was criticised by Judges Bonello, Spielmann and Tulkens, at 26.

back at *N*, it should be noted that, during the years that the applicant spent in the UK, her condition had been stabilised thanks to the medical treatment she had received; she had achieved a decent standard of living and had established close ties to individuals and organisations that had supported her in dealing with her condition.⁴⁸ Her removal from the UK, on the other hand, would probably have meant a dramatic change of circumstances; antiretroviral therapy is available in Uganda only to half of those that need it,⁴⁹ so her life prospects would be “bleak”⁵⁰ and her condition “appalling”;⁵¹ and she would “suffer ill-health, discomfort, pain and death within a year or two”.⁵² The act of deportation, whose effect would be a high risk of a tragic deterioration of her health – her suffering and death – was the act that perhaps violated the duty of rescuing an individual in serious peril. This situation could have been found, in my view, to reach the minimum level of severity of Article 3.

Floodgates

What really led to the rejection of *N*, i.e. the real reason why the treatment was said not to reach the minimum level of severity, was not explicitly articulated in the reasoning of the majority, but was implied in the judgment when the court suggested that the Convention did not impose on Member States a duty to alleviate poverty through the provision of medical treatment to foreigners, as this would be extremely burdensome for them.⁵³ This point was emphasised with regret by Judges Bonello, Spielmann and Tulkens:⁵⁴

[T]he real concern that [the majority of the court] had in mind [was that] if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched.

A similar argument had been put forward by Lord Hope, who observed that finding a violation of Article 3 in *N* “would result in a very great and no doubt unquantifiable

⁴⁸ *N* at 27.

⁴⁹ *N*, citing reports of the World Health Organisation, at 19.

⁵⁰ Lord Hope, *N* (House of Lords) at 20.

⁵¹ (*ibid.*:3).

⁵² (*ibid.*).

⁵³ *N* at 44. The same argument has been used in the past. See, for instance, *Vilvarajah & Others v UK*, App. No.'s. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87; judgment of 30 October 1991 at 105.

⁵⁴ *N*, dissenting opinion at 8.

commitment of resources”.⁵⁵ Is this consideration legitimate, and if so, is it justified? The ‘floodgates argument’, according to which the negative consequences of an act may be so extensive as to relieve the State from a prima facie obligation that it has, ought to be regarded with great scepticism. It implies that imposing a certain Convention duty on a State would place an extensive burden – one that was perhaps impossible to bear – on its resources. The implications of accepting this argument in the present case would be that, even if Ms N had had a right to remain in the UK, and even if the UK had a duty not to deport her, it might have been relieved from this correlative duty had there been concrete evidence that the decision would lead to waves of medical asylum seekers wishing to benefit from treatment available in the country. It could be said that the principle of nearby rescue, articulated above, leaves space for such considerations, when it refers to the potential disproportionate cost of the imposition of the duty. It is important to appreciate, though, that when the question is whether we have an obligation to save someone from extreme suffering and death, for the cost on us to be found disproportionate it ought to reach a similar degree of magnitude and urgency, and should involve goods as precious as health and bodily integrity.

So if the floodgates argument was indeed the reason that took priority and determined the decision of the court, it should have been clearly articulated and supported with appropriate evidence – something that we find nowhere in the decision of the majority. Interestingly, the ECtHR has in the past rejected the argument that limited resources may relieve a State from its obligations under Article 3. In a number of cases that looked at whether extremely poor prison conditions in Ukraine violated the Convention, for instance, it stated that –⁵⁶

... lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention.

In addition, the argument that there will be floodgates of refugees if the appropriate protection is afforded has been regarded with great scepticism in other jurisdictions. One such illustration comes from the Supreme Court of Canada, where Mahoney JA stated that –⁵⁷

⁵⁵ Lord Hope, *N* (House of Lords) at 53.

⁵⁶ See, among others, *Aliiev v Ukraine*, App. No. 41220/97, judgment of 29 April 2003 at 151.

⁵⁷ See *Chan v Canada (Minister of Employment and Immigration)*, (1995) 3 SCR 593 at 57.

... the possibility of a flood of refugees may be a legitimate political concern, but it is not an appropriate legal consideration. To incorporate such concerns implicitly within the Convention refugee determination process, however well meaning, unduly distorts the judicial-political relationship.

While the majority of the court did not analyse the floodgates argument, the dissenting judges who argued that it played a determinative role in the decision of the majority questioned this consequentialist consideration with compelling evidence, found in the so-called Rule 39 statistics of the court, concerning requests for interim measures in cases of asylum.⁵⁸

And finally, scepticism towards the suggestion that a more expansive protection of refugee rights would necessarily lead to a great increase in the numbers of those seeking to make use of this protection has been expressed in academic literature, where it has been supported that there is no evidence that refugees easily flee their countries in order to enjoy some privilege in an affluent but remote State.⁵⁹

Implications

The implications of the *N* judgment are already apparent in medical asylum applications. In Strasbourg, following *N*, approximately 30–50 similar cases were dismissed as inadmissible by a committee of three judges. Examples from the UK include *RS (Zimbabwe) v Secretary of State for the Home Department*,⁶⁰ involving a Zimbabwean national who was HIV-positive, but whose condition had been stabilised due to medical treatment. The Court of Appeal had held the case back until the ECtHR had decided *N*. Yet, following the judgment of the Grand Chamber, which it discussed in detail, it attempted to distinguish between the two situations as Ms RS, if she returned, would face hardship not only because of her illness, but also due to the oppressive policies of the Zimbabwean government. The confusion created by the distinction drawn in *N* between harm emanating from natural causes and harm provoked by human actions or omissions is evident in the opinion delivered by Lady Justice Arden, which stated that there may sometimes be a complication when both the *Saadi* and the *N* principle

⁵⁸ *N*, dissenting opinion at 8.

⁵⁹ See Foster, M. 2007. *International refugee law and socio-economic rights*. Cambridge: Cambridge University Press, pp 344–348.

⁶⁰ *RS (Zimbabwe) v Secretary of State for the Home Department*, Court of Appeal (Civil Division), 18 July 2008, (2008) EWCA Civ 839.

are involved. As the *RS* application invoked both medical and political considerations, the Court of Appeal allowed the appeal and returned the case for consideration to the immigration tribunal.

At the same time, the increased latitude that courts now have in rejecting medical asylum cases reaches beyond applications by people suffering from HIV, and also covers other medical asylum claims. An example is the *RA (Sri Lanka) v Secretary of State for the Home Department*⁶¹ of the Court of Appeal, where the applicant – who was mentally ill and suicidal – argued that his deportation would breach Article 3. The argument advanced by the applicant that mental illness cases should be approached differently, as the very act of deportation may have a further damaging effect on the person's health, was rejected. In doing so, the court relied on a passage from *N*, which did not distinguish between the treatment of mental and physical illnesses for the purposes of Article 3.

Conclusion

The Convention does not impose an obligation to rescue the nearby needy, held the majority of the ECtHR in *N*, even if this can be fulfilled at a minimal cost. The return of the desperate foreigner to her home country was found to be compatible with the prohibition of inhuman and degrading treatment, notwithstanding the high likelihood of the irreversible tragic effect of acute physical and psychological suffering and early death that would most probably follow. The present article suggested that the judicial reasoning in the case suffers from several shortcomings.

The most serious concern, to conclude, is that the sad effects of this judgment will not only become evident in subsequent case law, where there is a chance that authorities and courts will need to provide far less of an explanation as to their decision to leave other desperate needy unprotected. The consequences will be wider still, for the judgment of the majority of the Grand Chamber set a precedent that undermines the belief that human rights law has a role to play for those that are most in need of it. *N* constitutes a statement that the dignity of the poor and needy foreigner amongst us does not carry equal worth to ours, since we are privileged enough to live in affluent communities and are not prepared to make an effort to rescue them – even at a relatively low cost.

⁶¹ *RA (Sri Lanka) v Secretary of State for the Home Department*, Court of Appeal (Civil Division), 6 November 2008, (2008) EWCA Civ. 1210.

Editor-in-Chief's postscript: *N v UK* – A lesson for southern Africa?

Mantouvalou's article does not affect Namibian or southern African law in any direct manner. For example, the ECtHR decisions do not fall within the ambit of Article 144⁶² of the Namibian Constitution, and neither do those of the British Court of Appeal. But in this instance, both judgments may have persuasive value in the ongoing 'foreigner crisis' in southern Africa, which can easily spill over into Namibia.

If the guidelines of the ECtHR and the British Court of Appeal were to be followed, one would need to decide between at least three scenarios, as follows:

1. Where the so-called nearby needy will suffer ill-treatment in the home country upon return (*Saadi v Italy*,⁶³ *Soering v UK*⁶⁴)
2. Where the nearby needy will suffer as a result of a condition in (or any other intervention by) the home state. This scenario can be subdivided as follows:
 - 2.1 Where an individual requests asylum and the envisaged inhumane and degrading treatment and conditions in his/her home country are "very exceptional", or⁶⁵
 - 2.2 Where returning an individual will result in "a dramatic deterioration of life quality and expectancy",⁶⁶ but the conditions are not considered to be "very exceptional"⁶⁷, and
3. Where the expected suffering upon an individual's return to his/her home country will at least partly be the result of a politically oppressive situation.⁶⁸

⁶² "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".

⁶³ App. No. 37301/06, judgment on 28 February 2008.

⁶⁴ App No. 14038/88, judgment on 7 July 1989.

⁶⁵ *D v UK*, App. No. 30240/96, judgment on 2 May 1997.

⁶⁶ See Mantouvalou, above.

⁶⁷ *N v UK*, App. No. 26565/05, judgment on 27 May 2008.

⁶⁸ *RS (Zimbabwe) v Secretary of State for the Home Department Court of Appeal*, 18.07.2008, EWCA Civil 839.

The last-mentioned scenario is closely related to southern Africa. When it comes to refugees, the vast majority of the nearby needy are now Zimbabweans, who are knocking at the doors of their closest neighbours – Botswana, Malawi, Namibia, South Africa, and Zambia. Botswana's strong stand against the Mugabe Government does not make it a safe destination for the most vulnerable: the workers and lower-middle-class migrants from Zimbabwe.⁶⁹ While Botswana is the second most popular destination for Zimbabweans, and despite the Government there having implemented the 1951 United Nations Convention Relating to the Status of Refugees legalistically, they are deporting huge numbers who seek refuge there and they refuse medical care to any who are HIV-positive.⁷⁰

Commenting on a recent report by the Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand in South Africa, the Kenyan *Daily Nation* eloquently described the present situation of the flow of Zimbabweans in the southern African region:⁷¹

The “humanitarian nature” of the mass movement of Zimbabweans to neighbouring Southern African countries has blurred the distinction between what is a “refugee” and an “economic migrant”, because such people fit neither category perfectly and fall between the cracks ...

The Zimbabweans that have been crossing the borders since the beginning of the political and economic crisis in their country do not fit the traditional *refugee* or *asylum seeker* definitions; indeed, most of them do not apply for refugee status or asylum, irrespective of the reason for having left their home country. There are many reasons for this, one being that Zimbabweans see their problems as temporary. Since 2007, when negotiations began between the ruling Zimbabwe African National Union – Patriotic Front (ZANU–PF) and the two branches of the opposition party, the Movement for Democratic Change (MDC), Zimbabweans have been preparing to return home. Those who are crossing their neighbours' borders to go back home do so because they do not want to be seen as victims in their host countries. Rather, having undergone possibly the best schooling in Africa, they want to contribute to their host countries. In Botswana and Namibia, Zimbabweans are

⁶⁹ Kiwanuka, M & T Monson. 2009. *The Zimbabwean migration into southern Africa: New trends and responses*. Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand.

⁷⁰ (ibid.:48).

⁷¹ “Zimbabwean refugees would rather operate as illegals”, *Daily Nation*, Nairobi, 16 December 2009; available at www.nation.co.ke/News/africa/-/1066/823976/-/125mt4az/-/; last accessed 1 January 2010.

increasingly occupying positions in the public service; in Namibia, many are in the judiciary.⁷² However, very few – if any – of these public servants see their stay in Namibia and Botswana as anything more than a temporary necessity to survive.

Since refugees in Botswana, Malawi, Namibia and Zambia are placed in refugee camps – even after refugee status has been granted – and their rights to work and move around are restricted, only desperate political refugees opt for this route. In their report on Zimbabwean migration, Kiwanuka and Monson comment that the migrants often have only one tool to survive: their ability to trade Zimbabwean-made products and, with the proceeds, buying commodities in the host country to take back to their families in Zimbabwe.⁷³

Even when these migrants opt to apply for refugee status, it is extremely difficult to obtain. Mozambique, for example, is reluctant to award refugee status to opposition party members from Zimbabwe – possibly because of the close relationship it has with the ruling ZANU–PF party. Mozambique also does not recognise the category of *economic refugee*.⁷⁴

While South Africa has granted asylum to some Zimbabweans, it is clearly a politically controversial process. The struggle of the prominent white farmer and opposition politician, Roy Bennett, to obtain asylum in South Africa is well documented. Bennett’s application for asylum was initially rejected by the Refugee Status Determination Office in Pretoria, together with those of eight other applicants. The reason given for their rejection was that the Office discarded as “manifestly unfounded” the applicants’ claims of human rights abuses in Zimbabwe.⁷⁵ Bennett later received asylum on appeal. Unlike other southern Africa countries, people with refugee status in South Africa are not kept in isolated camps, but are allowed to move freely and even to work.

⁷² See Kiwanuka & Monson (2009:8). In Namibia, the Director of International Relations in the Ministry of Justice and the Government Attorney are Zimbabweans, and several Zimbabweans serve as magistrates. Some respected Zimbabwean judges have also lent their value to the High Court Bench since the early 1990s.

⁷³ Kiwanuka & Monson (2009:38).

⁷⁴ (ibid.:14, 23, 35).

⁷⁵ “Manifestly unfounded: South Africa dismisses allegations of human rights abuses in Zimbabwe”, *Business Day*, available at <http://www.sokwanele.com/thisiszimbabwe/archives/405>; last accessed 4 January 2009.

The Zimbabwean migration report concentrated on Botswana, Malawi, Mozambique and Zambia. Of these countries, Botswana has reportedly been the most critical of the Zimbabwean Government. While Botswana is more willing than the other reported countries to grant asylum to political refugees from Zimbabwe, the report criticises Botswana's actions in sending unsuccessful asylum applicants back to Zimbabwe – without taking the possibility of refoulement into consideration.⁷⁶

How should the SADC region deal with these nearby needy? Given the solidarity among leaders in the SADC region, it is highly unlikely that political asylum cases will increase dramatically in the foreseeable future. With the possible exception of Botswana, while SADC leaders encourage Mugabe to reach a settlement with the opposition, they remain reluctant to criticise the Zimbabwean Government or see the crisis as the result of oppressive political actions by ZANU–PF. However, while most of Zimbabwe's neighbours have ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) as well as the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, social and economic rights are not generally treated as independent human rights.

Mantouvalou makes a legitimate and – for SADC's present dilemma – important point when she questions the validity of discerning between different sources of suffering under Article 3 of the European Convention:⁷⁷

Is it correct to place our attention on the source of suffering *following* the return of the applicant to her home country? Is this the crucial situation that gives rise to a breach of Article 3? This might be pertinent if we were looking at States' obligations towards the *distant* needy. However, if we are looking at the obligations of the authorities that seek to return an individual who is already within their borders, the crucial act does not concern the source of the suffering after that individual's return, namely some State action or omission, or some other disaster in a foreign country. [Emphases added]

Mantouvalou also points out the following:⁷⁸

⁷⁶ See Kiwanuka & Monson (2009:45, 69).

⁷⁷ See earlier in her contribution to the current volume.

⁷⁸ (ibid.).

The artificial dichotomy created between civil and political rights, on the one hand, and socio-economic rights, on the other, has been challenged over the last few years in academic literature and in law in several jurisdictions.

The source of the Zimbabwean suffering is a bone of contention.

There is no doubt that the situation in Zimbabwe can be described as “very exceptional”. How else can one understand an economic dispensation where inflation was so out of hand at one point in 2008 that hundred trillion Zimbabwe Dollar notes were being printed; where the frontrunner of the presidential elections had to withdraw from the final stage because he feared his followers would lose their lives; and where an estimated six million nationals left the country in the space of ten years? Despite the recent formation of a Government of National Unity there is still no light at the end of the tunnel. While there are goods in the major stores, the ordinary people do not have the foreign currency needed to buy them – and the Zimbabwean currency is basically worthless.

No one can doubt that, for many Zimbabweans, leaving the country is not an option. Even if SADC countries deny the political dimension of the Zimbabweans’ suffering, they cannot deny the humanitarian crisis in that country.

If we attempt to place Zimbabwe in one of the categories identified by the English Court of Appeal and the ECtHR, Zimbabweans can be classified as the nearby needy in a country with exceptional circumstances. President Mugabe’s sympathisers will blame the economic decay on the Western powers and their ‘misplaced’ opposition to Zimbabwe’s land reform programme. However, the Zimbabwean opposition itself places the blame on the Government’s political oppression.

As pointed out by Mantouvalou, the British courts accepted the political situation in Zimbabwe as circumstances where a “very exceptional” situation had been created or worsened by political oppression.⁷⁹

The judgment of a British court will not impress the friends of ZANU–PF, however. For them it would simply be another manifestation of British imperialism. Nonetheless, the SADC Tribunal ruled against Zimbabwe in a groundbreaking case on Mugabe’s land reform programme. While Zimbabwe’s Supreme Court acknowledged the Tribunal’s jurisdiction over

⁷⁹ *RS (Zimbabwe) v Secretary of State for the Home Department, Court of Appeal.*

Zimbabwe, overturning an earlier High Court judgment, the Zimbabwean Government per se denies such jurisdiction. But the fact that the Government refuses to comply with the judgment does not change its validity in terms of international law.

The economic deterioration of Zimbabwe can be ascribed to more than one issue, namely the withholding of economic aid by the European Union and the United States, and the Government's reckless land reform programme, to mention two major factors. In addition, no objective observer can deny that the opposition have been severely brutalised and oppressed, which is confirmed by the amnesty given to Roy Bennett and other opposition members by the South African Government and, to a lesser extent, by Malawi and Zambia.

Mantouvalou bemoans the emphasis on the source of suffering and the dichotomy between civil and political rights on the one hand, and social and economic rights on the other. The report on Zimbabwean migrants points at another traditional distinction that no longer helps vulnerable migrants in Africa, namely "the binary distinction between refugees and voluntary migrants".⁸⁰

Refugees benefit from guarantees of entry and protection under international law, while voluntary migrants – seen as synonymous with those who do not apply for asylum – are for the most part left to fend for themselves. The conditions of refugee status tend to favour applicants who have suffered clear forms of persecution in their home country, in line with the 1951 UN Convention, even though the OAU Protocol ... allows scope to recognise the effects of "events seriously disturbing public order in either part or the whole of [their] country of origin or nationality".

The OAU Protocol, which has somehow been forgotten by the international world and by African leaders, goes beyond a mere classification of *migrants* as refugees and economic migrants. It invites the successor of the OAU, the African Union, to take cognisance of events seriously disturbing the public order. African leaders, if they are concerned about the movement of literally millions of fellow Africans, will have to interpret the Protocol in the broadest purposive manner possible.

The 1951 UN Convention Relating to the Status of Refugees already protects the politically persecuted refugee, while the ICESCR can protect economic refugees, as Mantouvalou

⁸⁰ Kiwanuka & Monson (2009:62ff). See also Turton (2003:12), in Kiwanuka & Monson (2009:62).

points out.⁸¹ What is needed to take care of the vulnerable migrating Zimbabwean population is an interpretation of the OAU Protocol that will recognise the need to protect those migrating Zimbabweans (and migrating communities elsewhere) that do not fit the strict definition of a *refugee*.

Two important steps can help SADC members and other countries deal with the Zimbabwe crisis:

- Acceptance that the Zimbabweans' suffering is both a denial of their right to a dignified life in terms of the African Charter on Human and Peoples' Rights, as well as the ICESCR. Enough has been said by Mantouvalou on the issue of social rights as human rights; suffice it to say here that the lives of millions of Zimbabweans have been compromised by the country's economic failure.
- Creation of a dispensation were the nearby needy (the moving Zimbabwean population) can be cared for outside the traditional structures and understanding of *refugee* and *asylum seeker*, within the framework of the OAU Protocol.

South Africa seems to be the only country that has attempted to address the economic crisis as a human rights issue, possibly because of the recognition of social rights in its Constitution. In the rest of the SADC region, official dealings with the crisis of Zimbabwean migration are based on making a strict distinction between *political refugees* and *economic refugees*.

South Africa has also set an example by allowing Zimbabweans with refugee status to work and travel freely in the country. There is a perception that South Africa follows an unofficial policy of allowing Zimbabweans to enter the country without visas and to work without work permits. It is also possible that the flood of Zimbabweans crossing the South African border – legally and illegally – is just too huge to manage. A recent xenophobic outburst of violence against Zimbabweans in the farming community of De Doorns in the Western Cape Province is a clear indication of the problems that can be caused by the uncontrolled settlement of new workers in an established community.

While xenophobia can never be justified, the link between the unexpected action against foreigners – predominantly Zimbabweans – in 2008 and again in De Doorns in November 2009 is clear. Zimbabweans educated in the best schools in Africa and mobile enough to

⁸¹ See contribution by Mantouvalou in the current volume.

travel to South Africa or other SADC countries compete in the labour market with semi-skilled workers.⁸²

While Namibia has never officially relaxed the requirements for Zimbabweans to enter and work here, the presence of Zimbabweans in the food industry in Windhoek is an indication that Namibia's strict immigration laws are somewhat relaxed in their application to Zimbabweans.

If host countries cannot protect unofficial refugees from Zimbabwe against intimidation and xenophobic attacks, the nearby needy will receive little by way of long-term assistance or fair treatment. The report on Zimbabwean migration suggested the institution of a SADC Protocol creating protection for what could be seen as a different kind of refugee.⁸³ Zimbabwe has a lot to give to the SADC region with its skilled and well-educated workforce. The Protocol could ensure that those who are eligible for refugee status get a fair hearing in both political and economic cases. Those Zimbabweans who are also in need of financial relief for their own survival and that of their families back home, but who do not want to be kept in distant refugee camps, should be allowed to work or trade in the host SADC country.

The Protocol could also allow for some protection of vulnerable workers in the host country; the workers on the winelands of the Western Cape Province of South Africa may be such a group. And, while this issue should be dealt with in a politically sensitive manner, SADC countries cannot escape their legal responsibility because of difficult political situations, as Mantouvalou points out.⁸⁴

⁸² Misago, JP. 2009. "Violence, labour and the displacement of Zimbabweans in De Doorns, Western Cape". *Migration Policy Brief*, 2. Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand.

⁸³ Kiwanuka & Monson (2009:12, 77).

⁸⁴ See contribution by Mantouvalou in the current volume.